

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AMU, INC.	:	DETERMINATION
	:	DTA NO. 818995
for Revision of a Determination or for Refund of Cigarette	:	
Tax under Article 20 of the Tax Law for the Period Ended	:	
May 31, 2001.	:	

Petitioner, AMU, Inc., 660 E. 82nd Street, Brooklyn, New York 11236, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ended May 31, 2001.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York on January 22, 2004 at 2:45 P.M. Petitioner appeared by Muffy Oluwo, CPA. The Division of Taxation appeared by Mark F. Volk, Esq. (Paula J. Tunkel).

Since neither party herein elected to reserve time for the submission of post-hearing briefs, the three-month period for the issuance of this determination commenced as of the date the small claims hearing was held.

ISSUE

Whether the Division of Taxation properly denied petitioner's request for a conciliation conference on the basis that the request was not filed within 90 days of the date of the issuance of the Notice of Determination.

FINDINGS OF FACT

1. Petitioner herein, AMU, Inc., d/b/a Nice Cards and Gifts, operated a small gift shop located at 200 Fifth Avenue, New York, New York.
2. On May 31, 2001, the Division of Taxation ("Division") conducted a regulatory inspection of petitioner's premises. Said inspection revealed that petitioner's entire inventory of

cigarettes, consisting of 10 cartons, contained the proper cigarette tax stamps. However, the Division's investigator could not find any record of petitioner's having a valid Certificate of Registration as a retail dealer of cigarettes for the 2001 calendar year.

3. On September 20, 2001, the Division issued a Notice of Determination ("notice") to petitioner asserting that a penalty in the amount of \$3,500.00 was due for the period ended May 31, 2001. The notice advised petitioner as follows:

your vending machine(s) was found to be in violation for failure to have a valid NYS certificate of registration for the sale of cigarettes and/or tobacco products.

Therefore, a civil fine is imposed under Article 20 of the New York State Tax Law.

4. The notice was addressed to petitioner and sent by certified mail to its last known address at "200 5 Ave, New York, NY 10010-3302." The notice contained a statement advising petitioner that if it disagreed with the amount asserted due it "must file the Request for Conciliation Conference or a Petition For A Tax Appeals Hearing" by December 19, 2001 and that if no response was received by this date the notice would "become finally and irrevocably fixed and subject to collection action."

5. Petitioner contested the notice by filing a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). Although the Request for Conciliation Conference was dated November 29, 2001, the request was mailed in an envelope which contained a United States Postal Service postmark of March 5, 2002. The request was subsequently date-stamped as received by BCMS on March 7, 2002.

6. On March 22, 2002, BCMS issued a Conciliation Order Dismissing Request to petitioner wherein its request for a conciliation conference was denied since "The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on September 20, 2001, but the request was not mailed until March 5, 2002, or in excess of 90 days, the request is late filed."

7. Petitioner protested the Conciliation Order Dismissing Request by filing a timely petition with the Division of Tax Appeals, and this proceeding ensued. Since the Division has raised the issue regarding the timeliness of petitioner's Request for Conciliation Conference, the scope of the small claims hearing held herein was limited to this threshold jurisdictional issue. In instances such as this where the timeliness of the Request for Conciliation Conference is in dispute, the Division has the burden of proving proper mailing of the notice.

8. To establish the date that the notice was mailed, that it has a standard procedure for the issuance of notices of determination and that the standard procedure was followed in this case, the Division offered in evidence its certified mailing records, a copy of the notice, a copy of petitioner's sales tax return for the quarter ending May 31, 2001 and the affidavits of two employees familiar with the creation, processing and mailing of notices of determination. The certified mailing records, copies of the notice and sales tax return and the affidavits of the Division's two employees, when taken together, sufficiently established that the Division has a standard procedure for issuance of notices of determination and that said procedure was followed in the instant matter.

9. There is no dispute on petitioner's part that the notice was properly addressed and that it received the notice in a timely manner shortly after it was mailed. Petitioner maintains that on or about November 29, 2001, it mailed to BCMS, by ordinary first class mail, the Request for Conciliation Conference. BCMS has no record of ever receiving the Request for Conciliation Conference purportedly mailed on or about November 29, 2001.

10. On February 22, 2002, the Division issued a Collection Notice to petitioner requesting payment of the \$3,500.00 asserted due in the Notice of Determination dated September 20, 2001. Upon receipt of the Collection Notice, petitioner filled out the disagreed section of the form indicating that "I requested for [sic] conciliation conference on this matter and still awaiting a response - see attached copy of the request." After receipt of the Collection Notice petitioner also submitted a copy of the November 29, 2001 Request for Conciliation Conference to BCMS.

This copy, which was received by BCMS on March 7, 2002, was mailed by certified mail return receipt requested.

CONCLUSIONS OF LAW

A. Tax Law §§ 478 and 480-a(3)(a) authorize the Division to issue a Notice of Determination to a taxpayer assessing civil fines for the failure to obtain and display a valid certificate of registration for the retail sale of cigarettes and tobacco products. The determination finally and irrevocably fixes the tax unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking a revision of the determination within 90 days of the mailing of the notice. As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference with BCMS. The time period for filing such a request is also 90 days (Tax Law § 170[3-a][a]). The filing of a petition or a request for conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

B. Tax Law § 480-a(2)(d) provides that the provisions of Article 28 of the Tax Law relating to the personal liability for the tax, administration, collection and determination of tax shall apply to Article 20 of the Tax Law in the same manner and with the same force and effect as if those provisions of Article 28 had been fully incorporated into Article 20. Tax Law § 1147(a)(1), contained within Article 28, provides that a Notice of Determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable.” The mailing of such notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” (*Id.*)

C. Where a taxpayer files a Request for Conciliation Conference and the timeliness of said request is in question, the Division has the burden of proving that the notice was properly mailed (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV &*

Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). In the instant matter, the Division has presented sufficient evidence to prove that the Notice of Determination was properly mailed to petitioner at its last known address on September 20, 2001 (Tax Law § 478). Accordingly, in order to contest the notice, petitioner was required to file either a petition for a hearing or a Request for Conciliation Conference within 90 days of the issuance of the notice, i.e., on or before December 19, 2001 (Tax Law §§ 478; 170[3-a]).

D. There is no dispute in the instant matter that petitioner's Request for Conciliation Conference postmarked on March 5, 2002 was filed more than 90 days after the Notice of Determination was issued. Accordingly, resolution of the controversy at issue herein centers around petitioner's allegation that it first mailed a timely Request for Conciliation Conference on or about November 29, 2001 and the Division's assertion that it has no record of ever receiving the Request for Conciliation Conference mailed on or about this date.

E. Petitioner bears the burden of proving that the Request for Conciliation Conference was timely filed. The Tax Appeals Tribunal has held, on several occasions, that where there is no actual delivery of the document to the Division, oral testimony or other proof of ordinary mailing is insufficient, as a matter of law, to prove timely filing of a document (*see, Matter of YSC Fashion Corporation*, Tax Appeals Tribunal, January 23, 1992; *Matter of Bove*, Tax Appeals Tribunal, February 22, 1991; *Matter of Messenger*, Tax Appeals Tribunal, March 16, 1989). As relevant to this proceeding, Tax Law § 1147(a)(2) states that when a document which is required to be filed on or before a prescribed date is "delivered by United States mail to the . . . bureau . . . with which or with whom such document is required to be filed . . . the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery." Tax Law § 1147(a)(2) further provides that "if any document is sent by United States registered mail, such registration shall be prima facie evidence that such document was delivered to the . . . bureau . . . to which or to whom addressed." Regulation 20 NYCRR 2399.2(b)(2) also permits the use of United States certified mail and treats the date of the postmark on the sender's receipt

for certified mail as the date of filing. Here, petitioner chose to mail the first Request for Conciliation Conference using first class mail. Accordingly, petitioner has no documentary proof of mailing, and having failed to avail itself of the safeguards provided for by the use of registered or certified mail, it must bear the risk of nondelivery or mishandling. Since the Request for Conciliation Conference was first filed on March 5, 2002, a date clearly beyond the statutory 90-day time period for the filing of such a request, it must be concluded that the Division of Tax Appeals is without jurisdiction to hear this matter.

F. The petition of AMU, Inc. is dismissed.

DATED: Troy, New York
March 25, 2004

/s/ James Hoefer
PRESIDING OFFICER